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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 279

IN THE MATTER OF THE APPLICATION

of

CELIA WONG,

Petitioner,

against

MAURICE FINKELSTEIN, Chairman, and LOUIS TOTH, Individually and as Members of, and constituting the Temporary City Housing Rent Commission of the City of New York,

Respondents.

To review and annul the determination of respondents denying the application of petitioner for a Certificate of Eviction and for an Order to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law, pursuant to Article 78, Civil Practice Act.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS, AND BRIEF.

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August 18, 1949.

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Respondents.

To review and annul the determination of respondents denying the application of petitioner for a Certificate of Eviction and for an Order to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law, pursuant to Article 78, Civil Practice Act.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

Petitioner prays that a writ of certiorari issue to review the order of the New York Court of Appeals entered in the above-titled cause on the 20th day of May, 1949.

Opinions Below.

The opinion of Mr. Justice Cuff, sitting at Special Term, Part I, Supreme Court of the State of New York, County of Queens, is reported in 193 Misc. 289. The opinion by the Appellate Division of the New York Supreme Court, Second Judicial Department, reversing the order of Mr. Justice Cuff at Special Term is reported in 275 App. Div. 686. The opinion by the said Appellate Division, Second Judicial Department, in re Recknagel, etc., mentioned in the opinion in the case at bar, is reported in 275 App. Div. 684. The opinion of the New York Court of Appeals is reported in 299 N. Y. 205.

Statutes Involved.

The statutes involved are the Housing and Rent Act of 1948, as it relates to control of rents for housing accommodation and New York Local Law No. 66, as it relates to control of evictions from housing accommodations. The texts of the provisions of both the federal and local laws which are most pertinent to the questions presented herein are quoted in the Appendix.

Jurisdiction.

The order of the New York Court of Appeals sought to be reviewed was entered on May 20, 1949. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. Section 344) as amended by the Act of February 13, 1925.

A comparison of the state and federal statutes reveals that the federal law permits withdrawal of housing accommodations from the rental market, while the City ordinance forbids it. By virtue of the variance between the state

and federal law a very definite conflict is presented and, under the supremacy clause of the Constitution (Article VI), if the local law interferes with or is contrary to a law of Congress, the federal law is paramount and the local law must yield.

The ruling of the New York Court of Appeals was such as to bring the case squarely within the jurisdictional provisions Petitioner relies on. The state Court relied upon a non-federal ground in affirming the order of reversal of the Appellate Division, Second Department, and neither reached nor passed upon the constitutional questions presented by Petitioner.

Where the decision of the state court is, in terms, based solely upon grounds of state or general law, but a federal claim was timely and properly asserted before the state courts, the failure of the state court to pass upon the federal question thus asserted is not conclusive upon the Supreme Court, but the latter will proceed to determine whether the non-federal ground of the decision independently and adequately supports the judgment. See *Chicago, Burlington & Quincy Railway* v. *Illinois ex rel Drainage Commissioners,* 200 U. S. 561; *West Chicago St. R.R. Co.* v. *Illinois ex rel. City of Chicago,* 201 U. S. 506; *Wood* v. *Chesborough,* 228, U. S. 672. In determining the "adequacy" of non-federal grounds of decision, the Supreme Court applies its own criteria and determines the inquiry for itself. In *Albie State Bank* v. *Bryan,* 282 U. S. 765, the court said at page 773:

> "But the federal ground being present, it is encumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that Constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment."

And, see *Broadriver Power Co.* v. *South Carolina ex rel. Daniel*, 281 U. S. 537; *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Patterson* v. *State of Alabama*, 294 U. S. 600; *Ward* v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17; *Davis* v. *Wechsler*, 263 U. S. 22.

An analysis of the controlling decisions indicates that the phrase "adequate to support the judgment" has the following connotations:

1. The non-federal ground must be broad enough to sustain the judgment.
2. It must be independent, *i. e.*, it must not be so interwoven with the federal question as to be incapable of separate treatment and determination, and
3. Non-federal grounds plainly untenable will not defeat review.

The non-federal ground of state court decision must satisfy each of the foregoing tests to meet the minimum requirements under the following recent decisions of the Supreme Court:

Enterprise Irrigation Dist. v. *Farmers Mutual Canal Co.*, 243 U. S. 157;
Postal Telegraph & Cable Co. v. *Newport, Kentucky*, 247 U. S. 464, 475;
Petrie v. *Nampa & Meridan Irrigation Dist.*, 248 U. S. 154;
Ward v. *Board of County Commissioners of Love County, Oklahoma, supra;*
Minneapolis, St. Paul, S. Ste M. Railway Co. v. *Washburn Lignite Coal Co.*, 254 U. S. 370: 375;
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Davis v. *Wechsler, supra;*
New York Central Railway Co. v. *New York & Pennsylvania Co.*, 271 U. W. 124, 126;
Fox River Paper Co. v. *Railroad Commission of Wisconsin*, 274 U. S. 651;
McCoy v. *Shaw*, 277 U. S. 302;
Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 745;
Broadriver Power Co. v. *South Carolina ex rel. Daniel, supra;*
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 682;
Albie State Bank v. *Bryan, supra;*
Lawrence v. *State Tax Commission of Mississippi, supra;*
Patterson v. *State of Alabama, supra.*
Utley v. *City of St. Petersburg, Fla.*, 292 U. S. 106, 112;
Fox Film Corp. v. *Muller*, 296 U. S. 207.

In *Ward* v. *Board of County Commissioners of Love County, Oklahoma, supra,* the court said:

> "It therefore is within our province to inquire not only whether the (federal) right was denied in express terms but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. (Cases). Of course, if non-federal grounds plainly untenable may be thus put forward successfully, our power to review easily may be avoided. (Cases). With this qualification, it is true that a judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it cannot be reviewed by us."

It is well settled that the jurisdiction of the Supreme Court to review a judgment of state court, the effect of which is to deny a federal right, cannot be defeated by placing

such judgment on non-federal grounds which are plainly untenable. See *Postal Telegraph & Cable Co.* v. *Newport, Kentucky; Ward* v. *Board of County Commissioners of Love County, Oklahoma; Broadriver Power Co.* v. *South Carolina, ex rel. Daniel; Ancient Egyptian Arabic Order of the Mystic Shrine* v. *Michaux; Lawrence* v. *State Tax Commission of Mississippi;* all *supra.*

Questions Presented.

1. Is the New York City Local Law No. 66 and respondents' regulation promulgated thereunder constitutional:

   (a) For omission of the "standard" clause to relieve a property owner from compulsory renting, namely,

   "Nothing in this Act shall be construed to require any person to offer any housing accommodations for rent."

   (See Emergency Price Control Act of 1942, 56 stat. 23, section 4 (d); Housing and Rent Act of 1948, section 302; chapter 678, Laws of New York, 1948, Section 8589 Unconsolidated Laws, 1948)

   (b) For providing in the law and regulations a criminal penalty against petitioner for her pursuance of a Federally-granted right?

2. Does not the interpretation by respondents of the applicable laws and regulations, as approved by the New York Court of Appeals, render the said local laws and the regulations promulgated thereunder violative of the Constitution of the United States as follows:

   (a) Of the Thirteenth Amendment, in that petitioner is subjected to involuntary servitude of her tenant?

(b) Of the Fifth Amendment, in that petitioner's property is taken for public use without just compensation?

(c) Of the Fourteenth Amendment, in that the State has deprived petitioner of her property without due process of law?

(d) Of Clause 2, Article VI, in that the local laws and regulations are brought into conflict with the Act of Congress?

Statement.

This application seeks review by the United States Supreme Court of an order of the New York Court of Appeals, entered on May 20, 1949, which unanimously affirmed an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated February 21, 1949, which reversed on the law, dismissing the proceeding, the order of the Special Term, Queens County Supreme Court, November 26, 1948, annulling the determination of respondents August 17, 1948, which denied the application of petitioner for a certificate of eviction and directing the issuance of such certificate.

The issue evolves from the fact that petitioner applied to the New York City Temporary Housing Rent Commission for a certificate of eviction on a ground set forth in the Housing and Rent Act of 1948—withdrawal from the rental market, a ground not contained in the local law or regulations.

Petitioner owns a small two-family house in Queens County, New York City, one apartment upstairs which is her home, another downstairs, occupied by a statutory tenant who has been a holdover since November, 1946. (R* fols. 29-57)

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* "R." refers to printed record on appeal in the New York Court of Appeals.

On April 1, 1948, the effective date of the Housing and Rent Act of 1948, petitioner served the tenant with a sixty-days notice, on the ground that "the landlord elects to withdraw the property from the rental market" as required by Section 209 (c) of the Act. On July 1, 1948, petitioner filed with respondents her application for a certificate of eviction under section 209 (a) (5) of the Act.

On August 17, 1948, respondents denied the application on the sole ground that it was based upon a ground for which no certificate may be issued under the local regulations (fol. 44).

The Article 78 proceeding was commenced August 30, 1948, and the order granting relief as prayed for was entered November 26, 1948 (fols. 13-22), on the opinion of Mr. Justice Cuff (fol. 108-132). The order of reversal at the Appellate Division was entered February 21, 1949, (fols. 145-150) on the opinion of the Court, one Justice dissenting (fols. 151-162). The order of affirmance at the New York Court of Appeals was entered May 20, 1949.

From the beginning of the proceedings, Petitioner has taken the position that prior to 1947, Congress had prohibited all state or municipal rent and eviction controls (Emergency Price Control Act of 1942; Price Control Extension Act of 1946; 60 U. S. Statutes, 664, 671; U. S. Code, Title 50, Appendix, Sect. 902). But the Housing and Rent Act of 1947 contained no such restriction* and the

---

* Apparently the omission was an error. The following is from: Congressional Minutes of Hearings before Sub-Committee of the Committee on Banking and Currency, U. S. Senate, 80th Congress, 2nd Session, January 22, 1948:

"The Emergency Price Control Act formerly contained a provision to the effect that no owner was obliged to offer his housing accommodations for rent. It is our belief that the omission of a like provision in the existing act was entirely due to oversight. The opportunity to correct this now presents itself. We need not elaborate on the propriety of this suggestion and hope that the Congress will correct this error."

Common Council of the City of New York passed Local Law 66 on September 17, 1947. It provides *inter alia*:

> "c. Evictions. Except for non-payment of rent, no tenant shall be removed from any apartment by action or proceeding to evict or to recover possession, by exclusion from possession, or otherwise, unless the commission shall certify that one or more of the following grounds for such exclusion or eviction exists. * * *"

and then are enumerated the grounds, copied from the 1947 Federal Act then in force, all of them, and none other. Presumably, had the 1947 Act contained the withdrawal clause, it, too, would now be found in the Local Law.

Also, from Local Law 66:

> "d. Eviction Certificate. Application required. Prior to the institution of any summary proceedings or other action or proceeding to evict a tenant or to recover possession of an apartment, except for non-payment of rent, the person instituting such action or proceeding" * * * shall apply to the commission, in manner and form as prescribed, for a Certificate of Eviction.

Also, from Local Law 66:

> "k. Violations. Notwithstanding any other provisions of law, any person who, by himself or by another, violates any of the provisions of this section or any rule, regulation or order of the commission promulgated pursuant thereto, shall be subject to a fine not exceeding the sum of five hundred dollars or to imprisonment for a term not exceeding ninety days or both."

From Regulation II, Article VII, Section 1:

> "Any person who violates any of the provisions of this regulation or any rule or order promulgated

pursuant thereto, by his own act or by the act of his agent, servant or employees, *committed with or without his knowledge or consent*, shall be subject to a fine not exceeding the sum of $500 or to imprisonment for a term not exceeding 90 days or both." (Emphasis supplied).

It was the Housing and Rent Act of *1947* and Local Law 66 which were in concurrent control in New York City from September 17, 1947, to April 1, 1948. Since the latter date, the control lay between the Housing and Rent Act of *1948* and the Local Law. The 1948 Federal Act (Public Law 464, 80th Congress, 2nd Session, effective April 1, 1948) read, in part as follows:

> "Eviction of Tenants. Sec. 209 (a). No action or proceeding to recover possession of any controlled housing accommodation with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless * * *"

and at this point were enumerated the four grounds in the predecessor (1947) Act (which had been copied into the Local Law, as above stated) and *additionally* the following ground—for eviction after April 1, 1948:

> "(unless) * * * (5) The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

Section 302 also added (to the 1947 Act) the following:

> "Nothing in this Act shall be construed to require any person to offer any housing accommodations for rent."

Petitioner's contention has consistently been that the Local Law and Respondents' regulations are unconstitutional, in a negative sense, for omission of the "standard" clause to relieve a property owner from compulsory renting, and that they are unconstitutional affirmatively for inclusion of above quoted Section "k" of the Law and "1" of the Regulations as aforementioned under "Questions Presented"; that the interpretation by Respondents of applicable law and regulations, renders Local Law 66 and the regulations violative of the Constitution of the United States as hereinbefore stated; that it was the duty of Respondents officially to take cognizance of the ground for eviction contained in the Housing and Rent Act of 1948. By that token, the order at Special Term properly directed Respondents to issue the certificate of eviction.

Specification of Errors to be Urged.

The New York Court of Appeals erred:

1. In affirming the order of the Appellate Division of the New York Supreme Court, Second Judicial Department.

2. In not holding that the New York City Local Laws and Regulations, as interpreted by Respondents, are violative of the Thirteenth, Fifth and Fourteenth Amendments to the Constitution and of Clause 2, Article VI of the Constitution.

3. By basing its refusal to pass upon the constitutional questions advanced by Petitioner upon a non-federal ground insufficiently broad to sustain its ruling and which said non-federal ground is so interwoven with the federal questions as to be incapable of separate treatment and determination and which said grounds are plainly untenable.

Reasons for Granting Writ.

The Court below has refused to pass upon constitutional question of law which have not been, but should be, settled by this Court.

A federal right was denied both in express terms and in substance and effect by relying upon non-federal grounds of decision that were without any fair or substantial support.

The decision of the New York Court of Appeals dooms this Petitioner and subjects her to involuntary servitude of her tenant; deprives her of her property without just compensation, and without due process of law, and flagrantly violates the provision of Clause 2 of Article VI of the Constitution by giving precedence to a local law which directly conflicts with a law of the United States, constitutionally declared the supreme law of the land requiring the obedience of every citizen, whether in his individual or official capacity, and just as binding upon the State, as upon the Federal Courts.

Conclusion.

Because of the importance of the federal questions presented, because of the invasion of Petitioner's constitutional rights, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT BURTON BRILL,
Counsel of Record for Petitioner.

MILO O. BENNETT,
Of Counsel.

August 18, 1949.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

References to the opinions of the Court below and the grounds of jurisdiction as well as a statement of the case and specification of errors to be urged are contained in the petition and will not be here repeated.

POINT I.

The instant proceeding is without precedent. It is the first cause to be reported where the facts sustain a movant's claim that exercise of legislative power on private rights, in the matter of rent and eviction controls, has imposed the involuntary servitude proscribed by the Thirteenth Amendment of the Constitution of the United States.

The force of Petitioner's arguments against the constitutionality of the local laws and regulations "depends upon their application to the particular case" (*People ex rel. Durham Rlty. Corp.* v. *La Fetra*, 230 N. Y. 429, 42). If not by the clear allegations of the petition itself, then certainly by respondents' concession at folios 104-105, the instant proceeding comes to this Court as one apart. It is incontrovertibly established that this landlord is in the exercise of good faith, that she will not again offer the premises for rent, that she honestly desires not to have any tenant, that the present tenancy is forced upon her against her will, that it is the fact of this sole tenant in occupancy of her sole property which compels her to remain in the business of renting, that the tenant may lawfully demand of her services as landlord and that such services must be performed by her personally (Par. "2," Pet'n fol. 30).

These facts sharply distinguish *Marcus Brown Holding Company* v. *Feldman*, 255 U. S. 170 (where Mr. Justice Holmes deprecated the landlord's contention of violation of the Thirteenth Amendment), the facts showing that the appellant, landlord, was a corporation, that its properties consisted of large apartment houses, that vacating the one apartment, eviction of this single tenant, would in no wise relieve the landlord from the rental business and that the general nature of its operations was such as to preclude any valid claim of "personal services" to tenants, moving the Court to say, at page 199:

> "It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will even when he has contracted to render them. *But the services in question, although involving some activities, are so far from personal that they constitute the universal and necessary incidents of modern apartment houses.*" (Italics added.)

In *Plessy* v. *Ferguson*, 163, U. S. 537, 542, the opinion points out that the involuntary servitude proscribed by the 13th amendment connotes the control of labor and services of one man for the benefit of another *and the absence of a legal right to disposal of his own person, property and services.* It would seem that such "legal right" is withheld from this petitioner landlord under Local Law 66 and the regulations.

Again, in *Clyatt* v. *United States*, 197 U. S. 207, 215, the Court said:

> "A clear distinction exists between peonage and the voluntary performance of labor or rendering service in payment of debts. In the latter case, although contracting to pay his indebtedness by

labor or service and subject, like any other contractor, to an action for damages for breach of that contract, *he can elect at any time to break it and no law or force compels performance or a continuation of the services.*" (Italics added.)

Contra, in the instant proceeding: there is most assuredly a "law or force" compelling performance (Sec. 2040, Penal Law of the State of New York.)

There is present here, as in no other landlord-tenant case ever presented "involuntary servitude" in a very real sense. Petitioner must at all times hold herself available to correct such defects in the rented premises as may be complained of by the tenant. Nor could she safely delegate the power to another, for respondents' regulations (Regulation II, Article VII, Section 1), provide that if she violates any provision of any rule, regulation or order, by her own act, or by the act of her agent, servant or employee *"committed with or without his (her) knowledge or consent,"* she is subject to fine or imprisonment. Further to distinguish petitioner's cause from the general run of "rent cases," under both the September Rent Laws, 1920, and the 1942-1948 housing and rent acts and ordinances, there is, in the former, a complete absence of any financial motif, while in the latter the predominant theme is "maximum price," "minimum price," "price fixing," "price control," "scheduled rates," "depreciation," "loss of income," "profits deprivation," "fair return" or the like.

POINT II.

By omission of a clause to relieve property owners from compulsory renting ("nothing in this act shall be construed to require any person to offer any housing accommodations for rent"), the local law and regulations are rendered violative of the Fifth Amendment of the Constitution in that appellant's property is taken for public use without just compensation; and of the Fourteenth Amendment, in that she is deprived of her property without due process of law.

The 1947 Federal Act, upon which Local Law 66 was patterned, failed to protect landlords against compulsory renting by inclusion of the withdrawal from the market clause. That omission can in no wise justify a similar and continuing omission in the Local Law since April 1, 1948, when the new Federal Act, which does contain the protective clause, went into effect. Inaction of Congress upon local matters, where the exercise of concurrent jurisdiction is permissible, merely allows local action on the subject for the time being (*Escanaba Company* v. *Chicago,* 107 U. S. 678, 687). To the same effect are: *Welton* v. *State of Missouri,* 91 U. S. 275; *Henderson* v. *Mayor of New York,* 92 U. S. 259; *County of Mobile* v. *Kemball,* 102 U. S. 691; *Penna. R. R. Co.* v. *Public Service Com'n,* 250 U. S. 566, 569; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Northern Pacific R. R. Co.* v. *State of North Dakota,* 250 U. S. 135, 150.

In *Mondou* v. *N. Y. N. H. & H. R. R. Co.,* 223 U. S. 1, 53, 55, the Court held that the Federal Employers' Liability Act, although enacted several years after the Connecticut statute on the same subject, overruled the state law on

every point in conflict. Mr. Justice Van Devanter wrote for a unanimous Court:

> "True, prior to the present Act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce, for injuries received by their employees while engaged in such commerce. *But that was because Congress, although empowered to regulate this subject, had not acted thereon and because the subject is one which falls within the police powers of the State in the absence of action by Congress* • • •. The suggestion that the Act of Congress is not in harmony with the policy of the state and therefore that the courts of the state are free to decline jurisdiction is quite inadmissible because it presupposes what, in legal contemplation, does not exist. When Congress, in exercise of the power extended to it by the Constitution, adopted the Act, it spoke for all the people and all the states and thereby established a policy for all. *That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature and should be respected accordingly in the courts of the state*" (italics added).

To paraphrase the above, when Congress incorporated in the Housing and Rent Act of 1948 the provision which allows eviction when the landlord seeks in good faith to withdraw the subject premises from the rental market, that provision became binding on respondents to all intents and purposes as though it were a part of Local Law 66.

As noted in the first Point, it is facts in the particular case which control on questions of constitutionality. In the *Durham Realty Corporation* case (*supra*), the Court pointed out that it was there concerned with a class of landlords who took advantage of the situation to demand

exorbitant rents (p. 438), through whom profiteering and oppression had become general (p. 444), whose greed and extortion had become notorious and a class which "conspicuously offends" (p. 447), by "exaction of unjust and unreasonable rents" (p. 450) in a business of "wide spread oppression" (p. 451). Still concerned of course with the rent and eviction control law, the opinion recites (p. 440):

> "How it may operate on other classes or individuals not before the court is not our present concern. *The relator comes indisputably within the main purpose of the statutes, but it has no standing to raise questions which do not directly affect it* (cases cited)." (Italics added.)

Then, the Court concludes, "• • • when other material questions arise, the parties aggrieved will be heard in their own right." And one of those "material questions" mentioned by Judge Pound is: "*when a landlord desires to withdraw from the business of renting his premises for dwelling purposes.*" (Italics added.) Never until now has that question been presented to this Court.

The Court of Appeals of New York also said, *In Matter of Tartaglia* v. *McLaughlin*, 297 N. Y. 419, 425:

> "Under the now state-adopted law, the facts determinative of a landlord's right to possession must be passed upon by a local administrative agency in the first place. *This variation from the Housing and Rent Act of 1947 is the only difference between the two enactments that we need here consider, inasmuch as the petitioners have not shown themselves aggrieved by any other.*" (Italics added.)

Petitioner is now here on this new "material question" —she "desires to withdraw from the business of renting"

—and, further, differentiating her cause from any ever presented, granting of the relief sought will enable her actually to "withdraw" from the business, *for it is conceded that the subject premises are her sole realty holdings and the tenant, her sole tenant.* She is here, also, showing herself aggrieved by a feature of Local Law 66 other than that considered in the *Tartaglia* case. She is not a landlord in the true sense of the term, i. e., "The owner or holder of land or houses which he leases." It is an alien resident under the roof of her small house of whom she complains. In her case, as in the cases of so many other owners of two-family houses in New York City today (the "little landlords" for whom no other protecting plan has been devised), such acrimony exists that she is willing, desperately anxious, to forego whatever small income results from renting, to insure the safety of her premises and to make her house again a home. It would seem clear that this was what Congress had in mind when it provided, in Section 209 (a) (5), that property might be withdrawn from the rental market. Certainly no Board of Directors of the typical New York City "Landlord" can gain any advantage by use of Section 209 (a) (5), the landlord being bound by the certainty that the premises "shall not, at least so long as Section 209 (a) (5) of the act remains in force, again be offered for rent as housing accommodations either by him or by any subsequent owner" (*Woods* v. *Durr*, 170 Fed. 2nd 976, Nov. 8, 1948).

Mr. Justice Wenzel, in his dissent below, noted:

> "Nor may a person be compelled to continue in a business which he wishes to abandon" (fol. 162).

That the omission of a clause to permit property owners to withdraw premises from the rental market—*taking them*

out of the use which subjects them to controls—renders the control law void is seen from the cases following. In all the Acts of Congress—it was borne constantly in mind that a citizen cannot be compelled to be, or remain, in business—they merely recognized a fundamental principle. In *Munn* v. *Illinois* (1876), 94 U. S. 113, the opinion recites at page 126:

> "* * * When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use;* but so long as he maintains the use, he must submit to control * * *." (Italics added.)

And, again, at page 133:

> "There is no attempt to compel these owners to grant the public an interest in their property but to declare their obligations, if they use it in this particular manner."

In *Budd* v. *New York,* 143 U. S. 517, 536, citing *Munn* v. *Illinois* (*supra*), the Court said:

> "There was no attempt to compel the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner."

In *Taylor* v. *Bowles,* 145 Fed. 2nd 833, 834, the Court quoted Section 4 (d) of the Emergency Price Control Act, "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any housing accommodations for rent," and then added, significantly,

"Perhaps this prohibition was included in the Act to avoid possible constitutional difficulties. See *Bowles* v. *Willingham*, 1944, 321 U. S. 503, 517, 64 S. Ct. 641; *Yakus* v. *United States*, 1944, 321 U. S. 414, 431, 437, 438, 64 S. Ct. 660; *Wilson* v. *Brown*, 1943, Em. App. 137 Fed. 2nd 348, 351, 352."

In *Wilson* v. *Brown* (*supra*), the Court quoted Section 4 (d) and said:

"In accordance with the statutory provisions, the regulation now in question provides that a landlord may evict a tenant whose lease has expired if he 'seeks in good faith not to offer the housing accommodations for rent.' The landlord is thus free to occupy the premises himself or to devote it to some commercial enterprise or utilize it in any other way. This serves to emphasize that there has been no 'taking' of his property in the constitutional sense."

Again, in *315 West 97th Street Realty Co., Inc.*, v. *Paul A. Porter, Price Adm.*, 156 Fed. 2nd 982, the Court met a challenge to the constitutionality of the Price Control Act and the Rent Regulations by saying:

"'• • • Moreover, under the Act there is neither appropriation of the landlord's property nor compulsion upon him to continue his housing accommodations in the rental market • • •'" (citing *Taylor* v. *Bowles* and *Wilson* v. *Brown*) (*supra*).

In *Yakus* v. *United States*, 321 U. S. 414, 431-438, the petitioners similarly claimed that the Emergency Price Control Act was void because, under the regulations, the price established for their product did not permit them a profit. The Court said, at page 431:

"Section 4(d) declares that 'Nothing in this Act shall require any person to sell any commodity • • •.'

> *Petitioners were therefore not required by the Act, nor, so far as appears, by any other rule of law,* to continue selling meat at wholesale if they could not do so without a loss." (Italics added.)

And to the same effect see *Wilson* v. *Brown*, 137 F. 2d 348 (ECA 1943).

> In *Taylor* v. *Bowles*, 145 F. 2d 833 (ECA 1944), the Emergency Court of Appeals placed a broad construction upon Section 4(d) of the Emergency Price Control Act, holding that under its provisions a landlord might withdraw his housing accommodations from the rental market merely because of dissatisfaction with the existing maximum rents. We think that the almost identical provisions of Section 302 of the Housing and Rent Act of 1948 and the complementary provisions of Section 209 (a) (5), which that act added to the Housing and Rent Act of 1947, must be given an equally broad interpretation in accordance with their plain language in order to carry out the Congressional intent *to avoid any constitutional difficulty.*" (Italics added.)

In fine, as Mr. Justice Wenzel says in his opinion, the inclusion of Section 302 in the Act "preserves its constitutionality." Conversely, its omission renders Local Law 66 unconstitutional.

Nor is the question new to the Supreme Court in the City of New York. There was no specific provision in the September Rent Laws to relieve a property owner from compulsory renting, wherefore the constitutionality of the laws was brought into question.

In *Heyman* v. *Osterweis* (113 Misc. Rep. 282), the Court held the law unconstitutional, citing *Munn* v. *Illinois* (*supra*), because it *did* deprive a landlord of the right to discontinue the use which subjected his property to control.

In *Ullman Realty Co.* v. *Tamer* (113 Misc. Rep. 538), the Court sustained the constitutionality of the law because it did *not* prevent a landlord from withdrawing his property from the rental market, saying, at page 570:

> "• • • On the other hand, bona fide intent of withdrawal is both recognized and given aid by the Acts in question. Should the landlord wish to tear down his house, or use it for personal purposes, or grant it over to a co-operative group, who might desire to maintain it themselves, no former remedy is withheld from him. *Both ejectment and summary proceedings are at his command, and he can complain of no possible abridgment of remedy.*" (Italics added.)

The right of a New York City property owner to withdraw rental property from the market in 1946, under the Federal Law, and which, appellant contends, remains unchanged today, is defined in *Easley* v. *Murray Hill Operating Co.*, 187 Misc. Rep. 100, 102 (affd. without opinion, 271 App. Div. 967; motion for leave to appeal to the Court of Appeals denied, 271 App. Div. 1010):

> "• • • An owner has an absolute right to withdraw his property from the market and recover possession thereof; he is not required to maintain and offer the property for housing accommodations for rent if he seeks in good faith to withhold housing accommodations. As declared in subd. (d) of Sect. 4 of the Emergency Price Control Act of 1942, U. C. Code, Tit. 50, Appendix, Sect. 904, subd. (d), he may 'occupy the property himself or devote it to some commercial enterprise, or utilize it in any other way' (*Wilson* v. *Brown*, 137 Fed. 2nd 348, 352; see also *Taylor* v. *Bowles*, 145 Fed. 2nd 833, 834)."

In further support of the point that the Local Law is unconstitutional by reason of its omission of provisions to relieve a property owner from compulsory renting, the attention of the Court is respectfully directed to what may prove conclusive on the subject, namely, *legislative opinion implicit in an Act of the Legislature passed five weeks after the validation of Local Law 66.* It is Chapter 678, Laws of 1948, conveniently found in Sections 8581-8594, Unconsolidated Laws of 1948. It was the "stand-by" law, enacted to provide a contingent State remedy immediately available, if Congress failed to renew the then current Act (1947). What is now Section 302 of the 1948 Federal Act [formerly Section 4 (d)], "Nothing in this Act shall be construed to require any person to offer any housing accommodations for rent," became Subdivision 4, Section 8589—"Prohibitions"—[Unconsolidated Laws 1948]. What is now 209 (A) (5) of the Federal Act (formerly found in the Federal Regulations) was likewise incorporated in the State statute by the provision, in Subdivision 2, Section 8584 (Unconsolidated Laws, 1948), governing the potential State Commission, that its regulations should be "in conformity with those in force and effect at such time pursuant to such Federal Law."

POINT III.

Under the Supremacy Clause of the Constitution, Local Law 66, being in irreconcilable conflict with the Housing and Rent Act of 1948, is void. It "does not supplement the federal prescription; rather it infringes upon it" (*Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527, 537).

Hill v. *Florida*, 325 U. S. 538, 542;
Southern Pacific Co. v. *Arizona*, 325 U. S. 761, 766;
Rice v. *Santa Fe Elevator Corporation*, 331 U. S. 218.

As to "conflict," the opinion of the Appellate Division below recites at folio 158:

> "* * * and the relaxation of federal control over eviction * * * may not be construed as preventing the local authority from further restricting the right to recover possession of dwelling accommodations * * *."

It is respectfully suggested that the Court erred in its premise. There was *intensification* of control rather than "relaxation," when the 1948 Act of Congress added Section 209 (a) (5) giving the right to withdraw property and, in Section 302, setting forth the policy of the Federal Government.

Nor is reliance justified, to sustain the Order of the Appellate Division below, on *Dickson* v. *Uhlman Grain Co.*, 288 U. S. 188, cited twice in the opinion, at folios 158 and 159. (Reference is respectfully asked to the opinion of Mr. Justice Cuff at Special Term, fols. 116-119.) The

question before the Supreme Court in the *Dickson* case was as to "conflict" and Mr. Justice Brandeis wrote:

> "The Missouri law is in no way inconsistent with the provisions of the Federal act. It does not purport to legalize transactions which the Federal Law has made illegal. It does not prescribe regulations for exchanges. Obviously, manipulation of prices will not be made easier, or the prevention of such manipulation be made more difficult, because the state has declared that certain dealings in futures are illegal and has forbidden the maintenance within its borders of places where they are carried on. Since there is nothing in the state law which is inconsistent with, *or could conceivably interfere with the operation or enforcement of, the Federal Law,* the statute of Missouri was not superseded." (Italics added.)

In the case at bar, the Federal Act gives this landlord the right to evict if she desires to withdraw the premises from the rental market. The Local Law denies her that right. And it provides that she may be prosecuted criminally if she so much as undertakes (by "institution" of a proceeding) to enforce her Federally-granted right. *Certainly, there is the interference "with the operation or enforcement of the Federal Law,"* the want or absence of which in the Missouri statute, Justice Brandeis said, lent to the statute law its authenticity.

Savage v. *Jones,* 225 U. S. 501 (at fol. 159), is also cited in the opinion below. Any suggestion that this case affects petitioner's theory of irreconcilable conflict is refuted by *Quaker Oats Co.* v. *City of New York,* 295 N. Y. 527 (affd. 231 U. S. 787; rehearing denied, 321 U. S. 870). There, Judge Fuld, in dismissing *Savage* v. *Jones* from consideration, said:

> "* * * Indiana enacted a statute which went further. * * * The Court held the State Statute constituitonal and wrote (225 U. S. at p. 532), 'Congress has thus limited the scope of its prohibitions. *It has not included that at which the Indiana Statute aims.* * * *' (Emphasis Supplied)."

Again to quote from *Quaker Oats Co.* v. *City of New York* (*supra*), at page 537:

> "To paraphrase what was said in the *Cloverleaf* case (*supra*, p. 158) and in the *McDermott* case (*supra*, p. 133), to permit such regulation as is embodied in this statute is to permit a city to 'discredit and burden legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal Statute which have accrued both to the Government and the shipper, and to impair the effect of the Federal law.' "

Sustaining respondent's theory that, before a New York City landlord may evict a tenant, he "must show one of the alternative grounds prescribed by the Federal statute *and, in addition, one of the alternative grounds prescribed by local laws,*" the Appellate Division below said (fol. 158):

> "The Federal Housing and Rent Acts of 1947 and 1948 * * * may not be construed as preventing the local authority from *further restricting* the right to recover possession of dwelling accommodations where it finds such action to be required under its police power." (Italics added.)

If that were so, the legislative body of any state or city in the nation could, at the will of its members, nullify an Act of Congress.

It is clear, on the face of the Act itself, that Congress intended that there should be no state or local interference with a landlord's right to evict for the purpose of withdrawing his premises from the rental market. In *First Iowa Hydro-Electric Co-operative* v. *Federal Power Commissioner*, 328 U. S. 152, 178-179, the Court said that if it had been the wish of Congress to "make the applicant for permission to construct dams on navigable streams obtain the consent of the state as well as federal authorities, to each project, *the simple thing would have been to so provide.*" (Italics added.)

It is legislative intent that controls and this intention of Congress may be gathered from the fact that, in its provisions (Section 209), relating to "Eviction of Tenants," the Act does make some concessions to the states but, as noted, none with respect to 209 (a) (5). For instance, in (a) (1), there is express deference to the "law of the state in which the action or proceeding is brought." In (a) (4) appropriate approval "by Federal, State or local law for the alterations * * *" as may be required is stated as prerequisite thereunder. And in (a) (6), special concession is made to a "state or any political subdivision thereof." In (b), "any State or public agency" is permitted to maintain any eviction action "notwithstanding any other provision of this Act." *Expressio unius est exclusio alterius.*

To the same effect are:

State of Arizona v. *State of California*, 283 U. S. 423.
Mayo v. *U. S.*, 319 U. S. 441.
Rice v. *Santa Fe Elevator Corporation*, 331 U. S. 218.

Neither the war powers of Congress nor the police power of a state may justify removal of constitutional

limitations safeguarding essential liberties (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426; *Bowles* v. *Willingham*, 321 U. S. 503, 521), and "a state statute may not discriminate against rights arising under the Federal Law" (*McKnett* v. *St. Louis & San Francisco Ry. Co.*, 292 U. S. 230, 234).

The cases of *Molnar* v. *Curtin*, 273 App. Div. 322 (affd. without opinion, 297 N. Y. 967), and *Matter of Tartaglia, etc.* (297 N. Y. 419), both sustain petitioner's contention that there is conflict between the local law and the 1948 Federal Act.

The opinion (*Molnar* case) recites at page 326:

> "States and municipalities may adopt legislation dealing with the same subject as a Federal Statute *and designed to assist in its enforcement*" (italics added),

citing at this point, among other cases, *Gilbert* v. *Minnesota*, 254 U. S. 325, where the Supreme Court, decrying anarchistic efforts to retard conscription in the First World War, said at page 331:

> "We concur, therefore, in the final conclusion of the Court that the State is not inhibited from making 'the national purpose its own purpose to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.'"

The opinion then notes, also at page 326, that the Federal Act (1947) had no provision for obtaining a preliminary Certificate of Eviction and that the Local Law does contain such a requirement. Basing its conclusion solely on this distinction, the opinion recites:

> "• • • There is no doubt that the local law can be enforced without clashing with the Federal Law and without in any way impairing that statute • • •. The differences between the Federal Law and the Local Law are not 'of such a character as to render one inconsistent with the other.' "

The distinguishable facts in the case at bar are brought into clear perspective by the uncontradictable statement: If the Local Law be enforced against petitioner in the exercise of her right effectively to withdraw her property from the rental market, she might be arrested, imprisoned and fined for pursuing that right, given her by an Act of Congress.

In the *Tartaglia* case (*supra*), this Court found that Local Law 66 could be sustained, first, because it had been validated in the interim by an Act of the State Legislature (Chapter 4, Laws of 1948), and, second, because under the facts applied against the *1947* Federal Act, no conflict existed. The opinion continues:

> "Emergency control of rents and evictions would seem to be an affair for concurrent Federal and state action at least until the field is pre-empted by Congress *and so long as local legislation in that field does not conflict with the letter or policy of any Federal Enactment* (cases cited). Neither the Federal Housing and Rent Act of 1947 (citation) nor that of 1948 (citation) contains any prohibition against *local complementary action* by the states. • • • Nor can it be said in our judgment that a state law commanding a landlord to submit to a local administrative body the question of his right to possession 'conflicts with the Act of Congress, or plainly and palpably infringes its policy' (case cited). As we see it, a requirement of that kind is

simply an aid in the enforcement of the Federal Statute * * *." (Italics added.)

From September 17, 1947, the effective date of Local Law 66, respondents were in complete control of the eviction situation in New York City. There was none to challenge their authority. This was permissibly so to April 1, 1948, because, whenever a landlord applied for a Certificate of Eviction on any ground in the local law, his application, *ipso facto*, covered a ground in the Federal Law, then concurrent. The local law, under which respondents functioned, was appropriately considered "local complementary action," or "simply an aid to the enforcement of the Federal statute," as this Court subsequently determined it to be.

On April 1, 1948, however, the new Federal Act not only encompassed the grounds already in the federal and local laws but also added to them the new ground, to allow evictions when the landlord seeks to withdraw the premises from the rental market ("5" of Section 209-a), and these respondents refused to recognize the creation of a new ground for eviction. At that moment, Local Law 66 was bereft of its authenticity, it ceased to be an innocuous bit of local legislation, "complementary" and "an aid in the enforcement of the Federal statute" which, as Chief Judge Loughran intimated in the *Tartaglia* case, justified its existence. It became at once, and it remains today, the "nullity" accorded a conflicting local law by *Gibbons* v. *Ogden*, 9 Wheaton 1.

There is no provision for enforcement of the Federal Act. It was the obvious intention of Congress that this should be supplied by the states. Complete enforcement machinery was already to be found in the Civil Practice Act and the Real Property Law and, if the Common Council

of the City of New York sought further to legislate in this behalf, it must, indeed, be nothing more than the "local complementary action" described in the *Tartaglia* case.

POINT IV.

There is no expediency in upholding these local laws and regulations. Dire predictions, on the part of respondents, are wholly unwarranted.

The opinion at Special Term recites at folio 129:

> "It has been suggested that if the right to withdraw property from the rental market is upheld wholesale evictions will ensue. This is improper argument. In the first place it is pure conjecture on the part of the respondents, but even assuming that respondents are correct in their surmise, it is an argument which must be addressed to Congress, not to the Court."

At folio 130, Mr. Justice Cuff further says:

> "Presumably suitable penalties may be enacted to restrain those who would use this section for fraudulent purposes (cf. sec. 1444a of the Civil Practice Act)."

As to the latter, the attention of this Court is respectfully directed to Respondents' Regulation II, Article II, Section 8. It has been in effect since October 22, 1947 and reads:

> "Section 8. (a) A landlord who has applied for a Certificate of Eviction or to whom such a Certificate has been issued and whose intention or circumstances so change that the premises, possession of which is sought, will not be used for the purpose

specified in the application or Certificate, shall immediately notify the Commission in writing and surrender the Certificate, if issued, for cancellation.

"(b) It shall be unlawful for such a landlord to use the Certificate in connection with an action to remove or to evict the tenant.

"(c) Where such change of intention or circumstances occurs after the eviction of the tenant, it shall be unlawful for the landlord to use the premises for a purpose other than the one specified in the Certificate unless he obtains the prior written consent of the Commission. If the Commission denies its consent, it may direct the landlord to restore the tenant to possession on terms and conditions established by the Commission."

Thus, when a landlord has received his Certificate of Eviction on the ground that he seeks to withdraw premises from the rental market, should he thereafter offer the same for rent, not only may he be fined and imprisoned for his "unlawful" act but respondents may rehouse the tenant for such term as it may elect and at such rent as it may dictate, *or for no rent at all.* This petitioner contends, is penalty ample to deter any scheming landlord. Moreover, in the instant proceeding, the petitioner, upon violation of the restriction, would find herself in contempt of the Supreme Court of the State of New York. (Please see Par. "13," Petition, fol. 47.)

Conclusion.

The petition for a writ of certiorari should be granted since an important question of federal law has not been, but should be, settled by this Court.

Respectfully submitted,

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Dated: New York, N. Y., August 18, 1949.

Appendix.

Pertinent provisions of the Housing and Rent Act of 1948:

"Eviction of Tenants. Sec. 209 (a). No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless * * *"

"(5) The landlord seeks in good faith to recover possession of such housing accommodations for the immediate purpose of withdrawing such housing accommodations from the rental market, and such housing accommodations shall not thereafter be offered for rent as such."

Section 302:

"Nothing in this Act shall be construed to require any person to offer any housing accommodations for rent."

Local Law No. 66 of the City of New York.

Section U41-7.0 of the Administrative Code of the City of New York reads as follows:

"§ U41-7.0 *Protection of tenants in apartments from evictions.*—a. Declaration of policy. It is hereby declared that a serious emergency exists in the city of New York by reason of the shortage of apartments. Unless evictions from such accommodations are regulated, disruptive practices and abnormal conditions will produce serious threats to the

health, safety and general welfare of the inhabitants of the city. Action by local law is necessary to prevent chaos and confusion resulting from such disruptive practices. It is hereby declared to be the policy of the city to impose certain restrictions upon the rights of eviction of tenants from apartments in the city, for the purpose of alleviating the present housing emergency and preventing abuses.

b. Definitions. When used in this section, the following terms shall mean and include:

1. "Rent." The consideration which the landlord is legally entitled to demand or receive for, or in connection with the use or occupancy of an apartment.

2. "Person." Any individual, corporation, partnership, association or any other organized group of individuals or the legal successor or representative of any of the foregoing.

3. "Apartment." A room or group of rooms, rented or offered for rent, for dwelling purposes, as a unit, in any building or structure, except a hotel, apartment hotel, lodging house, rooming housing, or housing accommodation as defined in section U41-9.0.

4. "Landlord." An owner, lessor, sublessor, assignee or any other person receiving or entitled to receive rent for the use or occupancy of any apartment as herein defined or an agent of any of the foregoing.

5. "Tenant." A tenant, subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any apartment as herein defined.

6. "Commission." Temporary city housing rent commission created pursuant to section U41-6.0, as added by local law 54 for the year 1947.

c. Evictions. Except for non-payment of rent, no tenant shall be removed from any apartment by action or proceeding to evict or to recover possession, by exclusion from possession, or otherwise, unless the commission shall certify that one or more of the following grounds for such exclusion or eviction exists:

(1) The tenant is (a) violating an obligation of his tenancy other than an obligation to pay rent higher than the maximum rent which the landlord is legally entitled to demand or receive, or an obligation to surrender possession of such apartment or (b) subject to the provisions of subdivision e of this section, is committing a nuisance in such apartment or using such apartment for an immoral or illegal purpose or for other than living or dwelling purposes;

(2) Subject to the provisions of subdivisions h and i of this section, the landlord seeks in good faith to recover possession of such apartment for his immediate and personal use and occupancy as housing accommodations;

(3) Under the circumstances specified in subdivisions f and g of this section, the landlord seeks in good faith to recover possession of such apartment for the immediate purpose of substantially altering, remodeling, or demolishing such apartment or a building or structure containing the same and all of the conditions and requirements specified in such subdivisions f and g have been fully complied with.

(4) The apartment consists of nonhousekeeping, furnished housing accommodations located within a single dwelling unit not used as a rooming or boarding house and the remaining portion of which is occupied by the landlord or his immediate family.

d. Eviction certificate; application required. Prior to the institution of any summary proceedings or any other action or proceeding to evict a tenant or to recover possession of an apartment, except for non-payment of rent, the person instituting such action or proceeding shall file in triplicate with the commission, a verified application for a certificate of eviction. Such application shall contain a detailed statement of the facts upon which such action or proceeding is based. The commission shall promptly transmit a copy of such application to the department of housing and buildings and the department of health, which departments shall promptly furnish the commission with such information or reports as the commission shall require concerning the premises and the tenants thereof, described in the application filed pursuant to this subdivision.

The commission shall, as promptly as is practicable, render its determination granting or denying a certificate of eviction under subdivision c of this section and shall promptly notify the person filing such application for such certificate, of such determination.

e. Evictions: conduct constituting nuisance. No tenant shall be removed from any apartment by action or proceeding to evict or to recover possession by exclusion from possession, or otherwise, solely on the ground that the conduct of such tenant in the use and occupancy of such apartment constitutes a nuisance, unless such conduct interferes substantially with the comfort or safety of other tenants or occupants of the same or other adjacent building or structure, or unless such tenant has been found guilty by a criminal court of competent jurisdiction of malicious mischief or of maintaining a nuisance in such building or structure.

f. Evictions, alterations, improvements, demolition and construction. Notwithstanding any other provision of law, and except as otherwise provided in subdivision "g" hereof, no plan or permit for the improvement, demolition, construction or alteration of any building or structure or any portion thereof containing an apartment or apartments shall be approved by any borough superintendent of the department of housing and buildings, if such alteration, improvement, demolition or construction will require the eviction of any tenant from an apartment, unless the borough superintendent shall find

(1) that such alteration, improvement, demolition or construction is reasonably necessary to maintain the safety of such building or structure or

(2) that such demolition is to be made for the purpose of constructing a new building or structure containing a greater number of apartments than were contained in the structure to be demolished or

(3) that such alteration or improvement is for the purpose of subdividing an apartment containing not less than seven rooms occupied by less than one person per living room as defined by the Multiple Dwelling Law into a greater number of apartments. Upon approval of such plans and before proceeding with such alteration or improvement, application shall be made to the Commission for an order directing the tenant occupying such apartment to remain in possession of a suitable portion thereof, as determined by the Commission and to surrender possession of the remainder of said apartment, within a time to be fixed by the Commission, and to remain out of possession while such alteration or improvement of such remainder is being made. The order so granted shall be conditioned on the right of such tenant to first occupancy

of any apartment resulting from such alteration or improvement of such subdivided apartment. The Commission shall establish the term and conditions under which such alteration or improvement may be made and shall establish the maximum rent to be paid by the tenant occupying such suitable portion of such apartment and shall establish the maximum rent to be paid by such tenant for the first occupancy of any apartment selected by him in such subdivided apartment after it has been altered or improved. The Commission in establishing the maximum rent to be paid by the tenant occupying the suitable portion of such apartment shall take into consideration among other things the inconvenience of the tenant, the decrease in the number of rooms the tenant will occupy and the necessary expenses which the tenant may incur as a result of such alteration or improvement. Should the tenant fail to abide by the order of the Commission, it shall be empowered to issue a certificate of eviction as provided in "c" hereof.

g. Eviction; Demolition for the purpose of constructing other than housing accommodations. The commission may, upon application of a landlord, exempt from the operation of subdivision "f" hereof the demolition of a building or structure containing apartments for the purpose of constructing other than housing accommodations, if the commission finds that such demolition will not tend to hinder or defeat the purposes of this section, provided that such exemption shall be granted only upon such terms and conditions as will provide for the relocation of the tenants to other comparable dwelling accommodations, within the same borough, at rents not greater than the rents then being paid by such tenants.

h. Evictions; sale of apartments in buildings or structures. No landlord, seller or purchaser of any

apartment in any building or structure or of any stock or other evidence of interest in such apartment shall remove a tenant from such apartment by action to evict or to recover possession, by exclusion from possession or otherwise, on the ground that he seeks to recover possession of such apartment for the immediate and personal use and occupancy as housing accommodations by such landlord or purchaser.

The provisions of this subdivision shall not apply to (1) any sale or contract of sale of an apartment by a seller in occupancy of such apartment.

(2) Any sale or contract of sale of any apartment in any building or structure or of any stock or other evidence of interest in an apartment in any building or structure in which eighty per cent or more of the tenants occupying such building or structure have purchased or have contracted to purchase the apartments occupied by them or have purchased or have contracted to purchase any stock or other evidence of interest in the apartments occupied by them at the time of the filing by the landlord or by any other person entitled to file of any application for a certificate of eviction. For the purposes of this subdivision the term "apartment" shall not include servants' rooms which are non-housekeeping and located in the service portion of the building, and the term "tenant" shall not include the persons occupying such servants' rooms.

i. Evictions, sale of buildings or structures containing apartments. No landlord, seller or purchaser of any building or structure containing an apartment or apartments or any interest therein shall remove a tenant from any apartment therein by action to evict or to recover possession, by exclusion from possession, or otherwise, on the ground that he seeks to recover possession of such apartment for the immediate and personal use and occupancy as a hous-

ing accommodation by such landlord or purchaser, unless the purchaser shall have paid to the seller, in cash, at least 20 per cent of the purchase price under such sale or contract of sale, or 20 per cent of the assessed value of the land and the entire building or structure thereon, whichever shall be greater. The provisions of this subdivision shall not apply to:

(1) A purchaser who seeks to obtain possession of an apartment occupied by the seller of such building or structure.

(2) A sale or contract of sale of any building or structure containing apartments entered into by a purchaser who seeks in good faith to obtain possession of an apartment for his own personal and immediate use and occupancy, and who has obtained a loan to be used to purchase such building or structure, guaranteed in whole or in part by the administrator of veterans' affairs pursuant to the provisions of title III of the servicemen's readjustment act of 1944, as amended.

(3) A sale or contract of sale of any building or structure containing apartments made under the provisions of the national housing act of 1934, as amended, or pursuant to the rules and regulations of the commission thereunder, where the purchaser seeks in good faith to obtain possession of an apartment for his own personal and immediate use and occupancy.

j. Coercion and non-waiver. It shall be unlawful for any person, by coercion, fraud, duress or other illegal means, to deprive or attempt to deprive any other person of the benefits provided for by this section. Any waiver of any of the provisions of this section shall be unenforceable and void unless approved by the commission.

k. Violations. Notwithstanding any other provision of law, any person who by himself or by another violates any of the provisions of this section or any rule, regulation or order of the commission promulgated pursuant thereto shall be subject to a fine not exceeding the sum of five hundred dollars or to imprisonment for a term not to exceed ninety days or both.

l. Exemptions. The provisions of this section shall not be applicable to any federal, state, municipal or other governmental agency or public authority, or to the alteration, improvement, demolition or construction of any building or structure owned by a religious or charitable corporation or organization, or an educational corporation or organization which is not organized for profit, provided, however, that the new, altered or improved building or structure shall be used exclusively for religious, educational or charitable purposes, or for two or more such purposes.

m. Commission regulations. The commission shall have the power to adopt, promulgate, amend or rescind such rules, regulations or orders as the commission may deem necessary or proper to effectuate the purposes of this section, and is hereby authorized to investigate and to prosecute any violation of any of the provisions of this section or of any regulation or order promulgated pursuant thereto.

n. Separability. If any provision of this section or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of the section and the applicability of such provision to other persons or circumstances shall not be affected thereby.

o. Application and duration. The provisions of this section shall apply to all pending and future eviction proceedings and shall terminate on September 30, 1948, unless it is sooner determined by local law that the emergency no longer exists.

§ 2. This local law shall take effect immediately."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 279

In the Matter of the Application of
CELIA WONG,
Petitioner,

against

MAURICE FINKELSTEIN, Chairman, and LOUIS TOTH, Individually and as Members of, and constituting the Temporary City Housing Rent Commission of the City of New York,
Respondents.

To review and annul the determination of respondents denying the application of petitioner for a Certificate of Eviction and for an Order to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law, pursuant to Article 78, Civil Practice Act.

RESPONDENTS' BRIEF IN OPPOSITION

This brief is submitted in opposition to the petition for the issuance of a writ of certiorari to review the order of the Court of Appeals of the State of New York which affirmed an order dismissing the proceeding.

Statement of the Case

The petitioner applied to the respondents, constituting the Temporary City Housing Rent Commission of the City

of New York, for a certificate of eviction on the ground that she desired in good faith to withdraw the premises from the rental market (fols. 39-42). The application was denied for the reason that it was not based upon a ground for which a certificate could be issued under the local law (fol. 76). In denying the application the Commission did not inquire into the truth or falsity of the allegations contained therein. For the purpose of the proceeding they were assumed to be true (fols. 103-105).

Thereafter, this proceeding was commenced under Article 78 of the Civil Practice Act. Though mandamus has been abolished in form, the relief theretofore obtainable by way of writ or order of mandamus is available in a proceeding under Article 78. Civil Practice Act, Section 1283; Laws of New York of 1937, Chapter 526. The character of this proceeding as one in the nature of mandamus is clearly indicated in the title given to it by the petitioner: "to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law" (fols. 14, 15). It is again indicated in the petition itself (fol. 48).

The respondents interposed as a separate defense that they were not authorized by law to issue a certificate on the ground upon which the petitioner sought one (fols. 69, 70).

Legislation Involved

Section U41-6.0 of the Administrative Code of the City of New York creates the Temporary City Housing Rent Commission of the City of New York. The section of the Code which governs evictions from apartments in the City is U41-7.0. The latter section provides that, except for non-payment of rent, no tenant shall be removed from any apartment unless the Commission shall certify that one or more of several grounds exist (U41-7.0c). Those grounds do not include the desire of a landlord to withdraw the premises from the rental market.

Opinions Below

It was the opinion at Special Term that insofar as the local law did not permit withdrawal of the apartment from the rental market, it was contrary to the provisions of the federal Housing and Rent Act of 1948, and, therefore, void. The order directed the issuance of a certificate. The opinion is reported at 193 Misc. 289.

The Appellate Division in the Second Judicial Department reversed the order and dismissed the proceeding on the ground that the local law did not authorize the issuance of a certificate on the basis upon which it was sought, and that such lack of authorization was not in conflict with the statutes or the Constitution of the United States. The opinion is reported at 275 App. Div. 686. It relied upon *Matter of Recknagel*, reported at 275 App. Div. 684.

In the Court of Appeals, the order below was affirmed on the point of procedure. It held that the local law, of which the petitioner complained, gave the respondents no authority to perform the act which the petitioner sought to compel. Accordingly, the Court refused to order the respondents to issue a certificate. The per curiam opinion stated: "We neither reach nor pass upon the constitutional objections advanced by appellant." The opinion is reported at 299 N. Y. 205.

POINT I

The order below was grounded entirely upon a point of procedural law. It is not subject to review by this Court because the point of procedure was a tenable, independent, non-federal ground broad enough to sustain the order.

a.

The petitioner has designated this proceeding as one to compel the performance of a "duty specifically enjoined upon the respondents by law". The relief prayed for was

an order directing the respondents to issue a certificate of eviction. It is a proceeding in the nature of mandamus. Accordingly, it must appear that the respondents have the authority to perform the act which is demanded of them.

The dismissal of the proceeding was affirmed for the reason that such authority did not appear. This is clearly stated in the opinion of the Court below, which cited prior opinions of the same Court to the same effect.

The petitioner's real complaint is not that the respondents have refused to issue a certificate, but rather that the local law does not authorize them to issue one on the ground upon which she relies. It is that omission which is alleged to render the local law unconstitutional. Indeed, that is the very point which the petitioner has attempted to establish in her brief. If that be so, her remedy would seem to be not that of compelling the issuance of a certificate, but rather that of proceeding as if a certificate were not necessary in her situation.

Such a remedy had already been suggested by a decision in a case in which the facts were essentially the same as those in the instant one and in which the ground of the decision was the same as that later used by the Court of Appeals herein. *Matter of Pardee,* 193 Misc. 269 (1948), affirmed without opinion 275 App. Div. 659 (1st Dept., 1949). The Court stated:

> "This is an application to compel the Temporary City Housing Rent Commission of the City of New York to issue a Certificate of Eviction to petitioner. The latter claims that she seeks in good faith to recover possession of the four story and basement private house owned by her for the immediate purpose of withdrawing it from the rental market.
>
> Local Law No. 66 of 1947, of the City of New York, authorizes the Commission to issue a Certificate of Eviction only in certain contingencies specified in paragraphs 1 to 4, inclusive, of subdivision c of Section U41-7.0 of the Administrative Code of the City of New York. Said paragraphs do not include authority to issue a Certificate of Eviction in a case where the owner

of property used for dwelling purposes seeks the eviction for the purpose of withdrawing the property from the rental market. To grant the present application would be to require the Commission to issue a Certificate in direct contravention of the local law. The Court may not direct the Commission to do something which it is not legally authorized to do. It is unnecessary in view of the conclusion reached, to consider the contention of petitioner that it would be unconstitutional to require her to obtain a Certificate of Eviction in order to procure possession of her own property for the purpose of withdrawing it from the rental market. Assuming, without deciding, that petitioner's contention is correct, her remedy is not an application to compel the Commission to issue a Certificate which the local law does not authorize it to issue. Her remedy would seem to be the institution of a summary proceeding or action to obtain possession of the property without the Certificate required by subdivision c of paragraph U41-7.0 of the Administrative Code, on the theory that the requirement of such a Certificate in a case where the owner seeks possession for the purpose of withdrawing the property from the rental market is unconstitutional. The unconstitutionality of the local law in requiring a Certificate of Eviction in cases other than those specified in paragraphs 1 to 4 of the subdivision c, would not, however, have the effect of authorizing the Commission to issue a Certificate in cases not specifically authorized by the local law."

It may be noted that the opinions of the New York courts are entirely consonant with the views of this Court as to what acts public officers may be compelled to perform. *Supervisors* v. *United States,* 85 U. S. 71, 77; *United States* v. *County of Clark,* 95 U. S. 769; *Ex Parte Rowland,* 104 U. S. 604.

Though the petition herein suggests that the ground of the decision below is untenable, the supporting brief contains the citation of not one case to indicate that the theory of the decision is a fallacious one, or that it is in conflict with other decisions. Nor has an attempt been made to show that the cases relied upon by the Court of Appeals do not support its decision in the instant case.

b.

The petition alleges that the non-federal ground is so bound up with constitutional considerations as to be incapable of separate determination. The petitioner's brief contains no cases in support of this proposition, and an examination of the rationale of the decision below shows its complete freedom from constitutional considerations. It was based, simply on the theory that the respondents did not have the authority to issue a certificate on the ground upon which the petitioner sought one, and that they could not be compelled to exceed their authority. The Court stated that it did not "reach nor pass upon the constitutional questions" presented by the petitioner. No attempt has been made to indicate in what manner a determination of a constitutional question was necessary to the decision, or why the ground of the decision was not broad enough to sustain it.

In the instant case no issue of evasion is presented. It would be another question if the decision below left the petitioner with no other means of voicing her constitutional grievances. However, one method has already been suggested, and no complaint has been made that others are not available.

Had the Court below attempted to base its decision upon additional grounds of a constitutional nature, the non-federal ground would, nevertheless, have been sufficient to preclude review. In *Doyle* v. *Atwell,* 261 U. S. 590, the relators were arrested for violation of an ordinance alleged by them to be unconstitutional. Habeas corpus was denied by the state courts on the ground that the ordinance was constitutional and on the further ground that habeas corpus was not, under the state practice, the proper method of testing its validity. This Court declined to review for the reason that the procedural grounds for the decision were broad enough to maintain it. Cf. *McCoy* v. *Shaw,* 277 U. S. 302; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688.

c.

Review by this Court is improper where there is a tenable, independent, non-federal ground broad enough to sustain the ruling of the state court. *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Utley* v. *St. Petersburg*, 292 U. S. 106; *Broad River Co.* v. *St. Petersburg*, 281 U. S. 537; *Minneapolis, S. P. & S. S. M. R. Co.* v. *Washington Lignite Coal Co.*, 254 U. S. 370; *Petrie* v. *Nampa and Meridian Irrigation District*, 248 U. S. 154; *Enterprise Irrigation District* v. *Farmer Mutual Canal Co.*, 243 U. S. 157; *Wood* v. *Chesborough*, 228 U. S. 672.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NATHAN W. MATH,
Counsel for Respondents.

JOSEPH JAY,
ALFRED WEINSTEIN,
of Counsel.

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IN THE

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OCTOBER TERM, 1949.

No. 279.

IN THE MATTER OF THE APPLICATION

of

CELIA WONG,

Petitioner,

against

MAURICE FINKELSTEIN, Chairman, and LOUIS TOTH, individually and as members of, and constituting, the Temporary City Housing Rent Commission of the City of New York,

Respondents,

To review and annul the determination of respondents denying the application of petitioner for a certificate of eviction and for an order to compel the issuance of such certificate, being a duty specifically enjoined upon respondents by law, pursuant to Article 78, Civil Practice Act.

PETITIONER'S REPLY BRIEF—IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

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September 21, 1949.

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PETITIONER'S REPLY BRIEF—IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS.

POINT I.

The Court below by-passed the constitutional question. (299 N. Y. 205). Respondent's brief evades all discussion of the constitutionality of their Local Law 66.

If the local law is unconstitutional—and it is, indubitably (please see our Points I, II and III, pages 13-22, Main Brief), this Petitioner was entitled to relief from the Court of last resort in her own State. Failing that, she is entitled

to that relief at the hands of this Court, after 18 months of effort. Neither the Court of first instance (193 Misc. 289), nor the intermediate Appellate Court (275 App. Div. 686) offered any suggestion, even, that there was involved "a point of procedural law."

Petitioner's procedure was proper. She had, and has, no other remedy toward which reputable counsel would direct her. At pages 4 and 5 of their brief, Respondents quote at length *Matter of Pardee,* 193 Misc. 269—from *obiter dicta* in the Special Term opinion—

> "Her remedy would seem to be the institution of a summary proceeding or action to obtain possession of the property without the Certificate required" by the Local Law, "on the theory that the requirement of such a Certificate in a case where the owner seeks possession for the purpose of withdrawing property from the rental market is unconstitutional."

and then, ignoring the principle of *Ex Parte Siebold, (post)*, goes on to deny any authority in Respondents which does not emanate from "the local law." Respondents, not only as citizens, but also as city officials are bound also by Federal Law.

> "The provisions of the Constitution of the United States and the laws of the United States are the supreme law of the land and to these every citizen owes obedience, whether in his individual or official capacity."
>
> *Ex Parte Siebold,* 100 U. S. 371, 392.
>
> "The Constitution and laws of the United States are just as binding upon the State, as they are upon the Federal, courts."
>
> *Bowles* v. *Rugg,* 57 Fed. (2nd) 116, 119.

The Petitioner did not choose *to violate the penal law.* If this gentlewoman had proceeded to enforce her Fed-

erally granted right in the manner the learned Justice at Special Term indicates she should have done, then, by the mere *institution* of a summary proceeding without first having sought and received the favor of these Respondents, she would have subjected herself to criminal prosecution. Moreover, her counsel could not be permitted to assume the risk for, even if he had proceeded *without her knowledge or consent,* still she would have been

> "subject to a fine not exceeding the sum of $500 or to imprisonment for a term not exceeding 90 days or both." (Reg. II, Art. VII, Sec. 1—pages 9-10, Petition.)

POINT II.

Each of the three cases, cited and relied upon by the Court below, in support of the proposition that petitioner's procedure was wrong, recites the existence of a co-existent remedy—employable without risk of criminal prosecution.

In an earlier decision, the Court below clearly indicated that a citizen in the position of this Petitioner need not undertake such a "remedy of negative character" and "meanwhile, although the facts are not disputed • • • run the risk of criminal prosecution." (*New York Foreign T. Z. O.* v. *State Liquor Authority,* 285 N. Y. 272, 278.)

The three cases cited in the opinion and relied upon below are:

(1) *Re. Durr* v. *Voorhis,* 229 N. Y. 382;

(2) *Re. Hart,* 161 N. Y. 507;

(3) *Economy etc.* v. *Berry,* 234 App. Div. 214.

In *Matter of Burr* (*supra*), the Court said:

> "The method of the respondents does not unreasonably impair the rights of the appellant or the

> other candidates for the office of justice of the Supreme Court, or of the electors, and is not beyond the constitutional power of the legislature."

In *Matter of Hart* (*supra*), the opinion recites, of an application for a Writ of Mandamus to compel the Board of Canvassers to grant a certificate of election:

> "In such a case, where it appears that the office is in the possession of another claiming title thereto, the remedy of the relator is by an action in the nature of *quo warranto,* brought by the attorney general against the person who, it is claimed, unlawfully holds the office."

In *Economy etc.* v. *Berry* (*supra*), the relator sued to compel the Comptroller to strike from the records an assessment for street improvements. A proper remedy, said the Court,—"an adequate remedy at law"—lay with movant and "Where the petitioner is afforded another remedy, mandamus will not lie."

Conclusion.

This Petitioner seeks security from the ravages of alien residents under her own small roof. Too long have our Courts neglected New York City landlords such as she, who seek only to make their houses once again homes. The Writ should be granted.

Respectfully submitted,

HERBERT BURTON BRILL,
Counsel of Record for Petitioner.

MILO O. BENNETT,
Of Counsel.

Dated, New York, N. Y., September 21, 1949.